***United States Court of Appeals***

***for the Second Circuit***

# APPELLEE'S BRIEF

Original + Affid. of Mailing

# 77-6218

*To be argued by*
PROSPER K. PARKERTON

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P/S

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 77-6218**

LYNN ARGO, ARNOLD ARGO, HELEN DENNIS, JAY GROSSMAN, JUDY SWEDE, individually and as Directors of Birchwood Towers Tenants Association, Inc., MAX WULFSON and DORA FRIEDMAN, individually, and BIRCHWOOD TOWERS TENANTS ASSOCIATION, INC.,

*Plaintiffs-Appellants,*

—*against*—

PATRICIA HARRIS, individually and as Secretary of Housing and Urban Development of the United States; MORRIS SOSNOW, KATE SOSNOW, LEONARD R. SCHWARTZ, JERROLD A. LIEBERMAN, and LORRAINE S. SANFORD, doing business as Birchwood Towers # 1 Associates and doing business as Birchwood Towers # 2 Associates; THE CONCILIATION AND APPEALS BOARD,

*Defendant-Appellees,*

—*and*—

THE HOUSING AND DEVELOPMENT ADMINISTRATION OF THE CITY OF NEW YORK,

*Defendant-Cross-Appellant.*

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR DEFENDANT-APPELLEE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF THE UNITED STATES

DAVID G. TRAGER,
*Eastern District of New York,*
*United States Attorney.*

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# United States Court of Appeals

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*Defendants-Appellees,*

*—and—*

THE HOUSING AND DEVELOPMENT ADMINISTRATION OF OF THE CITY OF NEW YORK,

*Defendant-Cross-Appellant.*

# BRIEF FOR DEFENDANT-APPELLEE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF THE UNITED STATES

## Preliminary Statement

This is an appeal by plaintiffs Lynn Argo, Arnold Argo, Helen Dennis, Jay Grossman, and Judy Swede, individually and as Directors of Birchwood Towers Tenants Association, Inc., Max Wulfson and Dora Friedman, individually, and Birchwood Towers Tenants Association, Inc. [hereinafter tenants], from an order of the United

States District Court for the Eastern District of New York (Platt, *J.*) entered November 29, 1977. Plaintiffs seek on this appeal to have declared unconstitutional the preemption order issued September 1, 1976 by the Director of the Office of Loan Management of the Department of Housing and Urban Development [hereinafter HUD], preempting the New York City Rent Stabilization Association from regulating rentals at Birchwood Towers #1 and #2. The order being appealed from decreed: (1) that the regulation permitting preemption, 24 C.F.R. § 402 *et seq.*, was a valid exercise by HUD of Congressionally delegated powers; (2) that the application of the regulation resulted in a direct conflict with state and local laws governing rent regulation in the City of New York such that, under the Supremacy Clause of the United States Constitution (Article VI, Clause 2) the local rent regulation must yield; (3) that since the tenants were granted the procedural due process rights mandated by the court's opinion and order of January 13, 1977, HUD's determination of October 11, 1977 reaffirming retroactively the preemption determination of September 11, 1976 lawfully and validly preempted local rent regulation of Birchwood Towers; and (4) that commencing November 12, 1976, HUD approved rents are the legal maximum rentals which the landlords are entitled to receive. The tenants appeal from the order entered November 29, 1977, as an interlocutory order granting, continuing, or modifying an injunction pursuant to 28 U.S.C. § 2192(a)(1).

## Statement of the Case

The tenants are residents of Birchwood Towers and the tenants' association at Birchwood Towers, a residential housing development in Forest Hills, New York (50-51).[1] The defendants, Birchwood Towers #1 Associates

[1] Number in parentheses refer to pages of the appendix.

and Birchwood Towers #2 Associates [hereinafter, together with the individuals doing business under these names, landlord], are members of the Rent Stabilization Association (54). On September 1, 1976, the Director of the Office of Loan Management of HUD declared that it had preempted the New York City Rent Stabilization Association from regulating rents at Birchwood Towers (14-16). Thereafter, the rent implementation schedules submitted by the landlord were approved by HUD (42-43), and the landlord proceeded to implement the new rents as of November 1, 1976 (47-48). The tenants commenced this action seeking to have the preemption order issued by HUD on September 1, 1976 declared unconstitutional (59), and on October 27, 1976, the action was transferred from the United States District Court for the Southern District of New York to the United States District Court for the Eastern District of New York (tenants and the landlord having each moved preliminary injunction, an order to which they both consented was entered November 15, 1976 (62-65). This consent order, which was to continue in effect until further order of the court, provided, *inter alia*, that the disputed rental increases be paid to the tenants' attorneys as escrow agents with the escrow funds to be appropriately distributed upon final determination "after any appeals which may be taken by any party" (64-65).

By an opinion and order entered January 13, 1977 (66-84), reported at 425 F. Supp. 151, Judge Platt held: that the preemption regulation, 24 C.F.R. § 403 *et seq.*, was a valid exercise of Congressionally delegated powers; that there was conflict between local rent control laws and HUD's rent increases; that if HUD validly preempted the local rent control laws, the landlord could pass on any HUD authorized increases to tenants with existing leases; and that HUD must afford the tenants due process of law. Specifically, the district court found that due process required that, in order for HUD to preempt the

local rent control laws, it must give the tenants an opportunity to inspect the landlord's application and to submit to HUD written objections asserting why HUD should not preempt, and further, that HUD should outline in a written response why preemption was necessary or unnecessary. The order additionally decreed that until HUD made a finding in accordance with the announced procedures, the prior consent order entered November 15, 1976 was to remain in effect and that upon such an administrative finding, the escrow funds were to be awarded to the prevailing party.

After granting the tenants an opportunity to inspect the landlord's application and to submit written objections and materials in opposition to preemption, HUD issued a written decision on October 11, 1977 outlining why preemption was necessary and restating its prior decision to preempt local rent control over Birchwood Towers (120-124).

In the order entered November 29, 1977—which is the subject of the instant appeal—the court reaffirmed and clarified the holdings made in its earlier opinion and further decreed that the landlord had demonstrated irreparable injury and substantial probability of success on the merits (125-28). Judge Platt continued the provision of the November 15, 1976 order, entered into by consent of the parties, that the disputed rents be paid into escrow until final determination of the action and all appeals. He also ruled that the HUD approved rents were the legal maximum rentals, which the landlord was entitled to receive commencing November 12, 1976 (127).

At this point, it is important to focus on what the tenants are not appealing from in this interlocutory appeal, which is taken pursuant to 28 U.S.C. § 1292(a)(1). They are not challenging the court's determination as to

what procedures due process requires be afforded the tenants. They are not contesting the order insofar as it obliges them to pay the disputed rentals into escrow subsequent to October 11, 1977. Nor are they truly appealing the order to pay the disputed rentals into escrow between November 12, 1976 and October 11, 1977, since they had agreed to do so in the consent order entered November 15, 1976. Although plaintiffs claim to be appealing the validity of the preemption order issued September 1, 1976, the court never gave effect to that order, but instead found the preemption of local rent regulation of Birchwood Towers to be lawful and valid, based upon the HUD determination of October 11, 1977.[2]

The tenants' contention on this appeal from a preliminary injunction, which emerges upon analysis, is the limited claim that it was error for the district court to include in its order the decree that after application of the appropriate safeguards and after HUD's determination of October 11, 1977 reaffirming the necessity of preemption, the HUD approved maximum rentals that the landlord is entitled to receive are retroactive to November 12, 1976. It is the Government's position that under the particular facts and circumstances of the instant case, retroactive application of the administrative determination of October 11, 1977 is appropriate and proper.

The tenants also contend that the landlord is estopped from claiming irreparable injury by reason of the consent order entered November 15, 1976. Although this

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[2] HUD does not concede on this interlocutory appeal that the preemption order of September 1, 1976 was not validly issued. However, since HUD did afford the tenants the procedural safeguards found applicable by the court below, which resulted in the determination of October 11, 1977, and since it was upon this latter determination that the Court entered the order being appealed from here, the validity of the prior preemption order is not before the Court at this time.

contention is without merit, it will not be addressed in this brief because the Government did not consent to the order and this argument is thus more appropriately directed to the landlord.

## ARGUMENT

### Under the particular facts and circumstances of this action, application of the preemption determination of October 11, 1977 retroactively to November 12, 1976 is appropriate and proper.

Relying on *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) and *Bell* v. *Burson*, 402 U.S. 535 (1971), plaintiffs argue that they must be given the procedural safeguards found applicable by the district court before the HUD preemption order issued September 1, 1976 can be made effective. In so arguing, the plaintiffs are setting up a straw man to knock down because the district court never gave effect to that order and the validity of the September 1, 1976 preemption order is not before the Court at this time. Rather, the district court found the preemption of local rent control to be lawful and valid based upon the HUD determination of October 11, 1977 and applied this latter order retroactively to November 12, 1976, the date on which the plaintiffs voluntarily agreed to deposit the disputed rentals in escrow. Under the circumstances of this case, the retroactive application of the HUD determination of October 11, 1977 was proper.

In considering the retrospective imposition of liability under a statute, the courts have held that the statute does not violate due process if it is rational. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Adams Nursing Home of Williamstown, Inc.*, 548 F.2d 1077 (1st Cir. 1977). In *Usery* v. *Turner Elkhorn Mining Co.*, *supra*,

the Supreme Court held that an act which required coal mine operators to compensate for the death or disability due to pneumoconiosis of former employees who had terminated their employment in the industry prior to the passage of the act did not violate due process because it was a rational measure to spread the costs of the former employees' disabilities to those who had profited from the fruits of their labor. Similarly, the judicially imposed remedy which applied the October 11, 1977 preemption order retroactively to November 12, 1976 is a rational and proper remedy under the particular facts of this action.

In addition, the more recent cases applying due process requirements to the related, but distinctly separate, issue of whether procedural safeguards are required prior to the deprivation of a property interest have held that due process does not automatically mandate the application of those procedures prior to the deprivation of some type of property interest. As the Supreme Court observed in a recent case in which it found that a prior hearing was constitutionally mandated, *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976):

> " 'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to *time*, place and circumstances. . . .
>
> "[D]ue process is flexible and calls for such procedural protection as the particular situation demands." [citations omitted.]

In *Marlboro Corp.* v. *Ass'n of Independent Colleges*, 556 F.2d 78, 81-82 (1st Cir. 1977), this approach was articulated as follows:

> Whether the process is measured against constitutional or common law standards, current doctrine teaches that procedural fairness is a flexible con-

> cept, in which the nature of the controversy and the competing interests of the parties are considered on a case-by-case basis [citation omitted].

In the present circumstances, the disputed rentals were not paid pursuant to the HUD preemption order of September 1, 1976, as the plaintiffs contend. Rather, the funds were paid in escrow to the plaintiffs' attorneys starting on November 12, 1976, pursuant to an order which was explicitly consented to by plaintiffs' attorneys, with the provision that "[i]n the event it is finally determined that the Landlord is allowed to demand and receive the HUD rentals set forth on the HUD jeopardy rental implementation schedule, the monies paid into Court . . . shall be paid over to the Landlord" (65).

Plaintiffs consented to this order by way of a compromise to avoid risking entry of an order by the court which would have directed them to pay the disputed rentals to the landlord pending final judgment. Moreover, they agreed to the wording of the order, which by its terms provides for payment to their escrow agents until the issue of preemption is finally determined "after any appeals by any party" (64). Under these circumstances, the plaintiffs certainly had reason to know that the landlord would be deprived of the escrow funds for a considerable period of time. Thus, in evaluating the plaintiffs' interest in not having HUD preempt local rent control, the landlord's interest in avoiding default on his mortgage, and the public interest in encouraging private investment in pubicly supported housing programs, reason compels the conclusion that the subsequent decision as to whether preemption was necessary or unnecessary must be retroactive in this case.

The cases cited by plaintiffs are inapposite in these circumstances. Although *515 Associates* v. *City of Newark*, 424 F. Supp. 984 (D.N.J. 1977) and *Grammercy*

*Spires Tenants' Association* v. *Harris*, Civil Action No. 76 C 4028 (S.D.N.Y., *judgment entered*, October 13, 1977), involved similar issues, the situation in those cases was different in that no such consent order had been entered into and no subsequent administrative determination had been made reaffirming preemption. In addition, plaintiffs ignore the cases upon which the district court relied in support of its decision to continue the consent order requiring the disputed funds to be paid into escrow, and making their eventual distribution contingent upon an administrative determination rendered after applying appropriate safeguards. See *Keller* v. *Kate Maremount Foundation*, 365 F. Supp. 798 (N.D. Cal. 1972), *aff'd sub nom.*, *Geneva Towers Tenants' Organization* v. *Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974); *Ponce* v. *Housing Authority of County of Tulare*, 389 F.Supp. 635 (E.D. Cal. 1975).

Accordingly, under the particular facts and circumstances of this action, application of the preemption determination of October 11, 1977 retroactively to November 12, 1976 is an appropriate and proper remedy in consideration of the flexible concept of due process, the nature of the controversy, and the competing interests of the parties.

## CONCLUSION

**For the foregoing reasons, the order of the district court, which reaffirmed the necessity of preemption and decreed that the HUD approved maximum rentals are retroactive to November 12, 1976, should be affirmed.**

Dated: Brooklyn, New York
February 27, 1978.

Respectfully submitted,

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MARY MCGOWAN DAVIS,
PROSPER K. PARKERTON,
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# AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

Barbara Allen being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of March 1978 he served a copy of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Rosenstein & Kahn, 225 Broadway, New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

2nd day of March 1978

Juanita Mayo

JUANITA MAYO
Notary Public, State of New York
No. 31-4501911
Qualified in New York County
Commission Expires March 30, 1979